IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

MASS ENGINEERED DESIGN, INC. And JERRY MOSCOVITCH Plaintiffs, Counter-defendants, Cross-claimants vs. ERGOTRON, INC., DELL INC., DELL MARKETING L.P., and TECH DATA CORPORATION Defendants, Counterclaimants, and CDW CORPORATION, Counterclaimant and Third-Party Plaintiff and A.B. DISTRIBUTING, INC., D&H DISTRIBUTING COMPANY, EIZO NANO TECHNOLOGIES INC., INGRAM MICRO INC., INTERNATIONAL AUDIO VISUAL INC., SYNNEX CORPORATION, TECH DATA CORPORATION, CSAV, INC., GLOBAL MARKETING PARTNERS, INC., SEA LAND, INC., PEERLESS INDUSTRIES, INC., DOUBLESIGHT DISPLAYS, LLC, AND BRETFORD MANUFACTURING, INC. Third-Party Defendants,	§ §	JUDGE: LED Civil Action No. 02-06CV-272 JURY TRIAL DEMANDED

MASS ENGINEERED DESIGN, INC. and JERRY MOSOVITCH'S
MOTION FOR LEAVE TO AMEND INFRINGEMENT CONTENTIONS

Plaintiff Mass Engineered Design, Inc., and Jerry Moscovitch (collectively "MASS") respectfully request the Court to grant leave to amend Plaintiffs' Infringement Contentions. In support, MASS would respectfully show the Court as follows.

I. BACKGROUND

Pursuant to Patent Rule 3.1, MASS served its Preliminary Infringement Contentions on February 2, 2007. In those contentions, MASS identified the accused units MASS then believed were made, used, offered, or sold by defendants Dell, CDW, Ergotron, and Tech Data. The information underlying these contentions was gleaned from the websites and published literature of Dell, CDW and Ergotron. By contrast, however, Tech Data did not have a publicly-accessible website or literature. Instead, Tech Data provides access to such information only to its distributors, and thus it was not possible for MASS to identify which infringing units were sold by Tech Data.

II. AMENDED CONTENTIONS AS TO DEFENDANT TECH DATA

Tech Data objected and has not provided information from which MASS can identify all multi-display units Tech Data has offered or sold. On February 11, 2008, Tech Data did provide MASS a password enabling MASS to access the Tech Data website for the first time. This access enabled MASS to identify at least some multi-display units being offered or sold by Tech Data in 2008 which are believed to infringe. Accordingly, MASS requests leave to amend its Infringement Contentions as to Tech Data to more specifically identify those units that MASS can presently determine are infringing.[1] All of these units were previously identified as infringing in MASS' Contentions as to the other defendants. Thus, it comes as no surprise to Tech Data that MASS believes Tech Data's sales of these same units also infringe.

In a call to discuss this Motion, Tech Data's counsel stated that they did not

[1] Tech Data still has not supplied MASS with information concerning all multiple display units it sells or has sold in the past. Thus, even these contentions may need to be amended further once complete information is provided by Tech Data. Further, if Tech Data demonstrates to MASS that it has not sold the EIZO LS-HM1-D dual units, MASS will drop its infringement contention as to Tech Data on that unit, as agreed during the meet and confer.

oppose this Motion on the basis of timeliness or alleging any delay on the part of MASS. Instead, Tech Data opposes on the basis that third party defendants, Bretford and Chief, have filed declaratory judgment actions against MASS in Illinois and Minnesota, respectively. According to Tech Data, the issue of whether the accused Chief and Bretford units infringe should be resolved in those manufacturer-filed suits rather than in the case before this Court filed by MASS against a group of manufacturers, distributors, resellers. MASS believes that Tech Data's argument has no bearing on the simple issue here: whether MASS should be entitled to amend its infringement contentions. Nevertheless, even if the "customer suit exception" to the first-to-file rule ever becomes at issue, that exception does not apply to remove the infringement case from this Court. The declaratory judgment actions filed by manufacturers Bretford and Chief will not resolve all the infringement issues against the defendant-customers who are in this suit (CDW, Tech Data, Dell) as required under the "customer suit exception." *See Kahn v. General Motors Corp.*, 889 F.2d 1078, 1081(Fed. Cir. 1989) (vacating stay of first-filed suit against customer where second-filed suit by manufacturer would not resolve all claims against the customers in the stayed suit).[2]

III. AMENDED CONTENTIONS AS TO DEFENDANT CDW

Additionally, since filing its Preliminary Infringement Contentions, MASS has learned

[2] The Federal Circuit recognizes a "customer suit" exception whereby litigation brought by a manufacturer of infringing goods may take precedence over a suit by the patent owner against customers of the manufacturer. *Kahn*, 889 F.2d at 1081. The doctrine is based on the manufacturer's presumed greater interest in defending its actions against charges of patent infringement. *Id*. However, where the doctrine is applied, the second suit has resolved all charges brought against the customer in the first suit. *Id*. The premise behind the decision to stay an originally-filed proceeding to allow a later, manufacturer-filed suit to proceed is that the identical issues and parties are involved. But where that is not the situation, the general rule is that the first-filed suit should have priority. *See Id*.

that CDW is now offering two accused units that CDW apparently was not offering at the time the Preliminary Infringement Contentions were served. Based on a review of CDW's current website, MASS now believes that CDW is offering an infringing Bretford-manufactured display unit having three monitors (Bretford FPSM-D-DIS3-AL). Previously, MASS had accused CDW of selling Bretford Duals, Quads and six-screen units (Bretford FPSM-D-DIS2-AL, FPSM-D-DIS4-AL, FPSM-D-DIS62-AL), but MASS just recently became aware that CDW was offering a Triple. MASS' original contentions accused Defendant Dell of infringing by selling the Bretford Triple, so CDW always knew MASS believed that unit to infringe.

Likewise, MASS' original contentions accused CDW of selling infringing units made by Chief. Specifically, MASS believed that CDW was infringing by selling Chief dual monitor units and triple monitor units (Chief FTP-220, Chief FTP-320). From CDW's present website, MASS now believes that CDW is infringing by selling the Chief Quad FTP-440. MASS had previously accused Dell of infringing by selling the same Chief quad unit, so CDW always knew MASS considered it infringing. MASS' amended contentions add the Bretford Triple and Chief Quad as to CDW. The documents produced by CDW as of last week still did not list these units, and MASS only found them after re-checking CDW's website. CDW opposes this motion on the basis of the "customer suit" exception as described above. Further, CDW complains that MASS has delayed, and should have amended sooner to allege the addition of the Bretford Triple and Chief Quad units.[3]

IV. NO PREJUDICE TO ALLOWING THESE AMENDED CONTENTIONS

The parties presently are still exchanging documents and expert reports are not due until

[3] MASS has agreed that it will withdraw the contention as to CDW on the Chief Quad and Bretford Triple if CDW demonstrates to MASS that these were on the CDW website in February 2007 when MASS served its original contentions. The documents produced by CDW to date do not show sales of Bretford Triples or Chief Quads.

at least April 30, 2008. Moreover, all the units MASS wishes to add to its contentions already have been accused against other Defendants, so the addition does not add any new models - it just adds defendants who are selling these models, and for whom MASS could not have known were selling these particular devices at the time of the preliminary infringement contentions.

Because MASS was unable to discern that these infringing units were being sold by Tech Data ad CDW until very recently, and because the units in MASS' First Amended Infringement Contentions were all previously designated as infringing, and further because no depositions concerning infringement and damages have yet been taken, there is no prejudice to the parties in allowing MASS to serve these Amended Infringement Contentions.

Accordingly, for all the reasons stated above, MASS respectfully requests the Court permission to serve its First Amended Infringement Contentions.

DATED: March 12, 2008 Respectfully submitted,

/s/ *Robert Christopher Bunt*

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CERTIFICATE OF CONFERENCE

MASS has attempted to resolve these issues with all defendants via email and conference. Dell, Dell Marketing, LP and Ergotron do not oppose this motion. On a teleconference held March 13, 2008, counsel for MASS, Tech Data and CDW conferred, but were unable to come to complete agreement. Defendants Tech Data and CDW each oppose this motion.

/s/ *Robert Christopher Bunt*
ROBERT CHRISTOPHER BUNT

CERTIFICATE OF SERVICE

I hereby certify that the following counsel of record, who are deemed to have consented to electronic service are being served this 14th day of March, 2008, with a copy of this document via the Court's CM/ECF system per Local Rule CD-5(a)(3). Any other counsel of record will be served by electronic mail, facsimile transmission and/or first class mail on this same date.

/s/ *Robert Christopher Bunt*
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